

United States Senate

WASHINGTON, DC 20510

October 15, 2009

The Honorable Eric H. Holder Jr.
Attorney General
U.S. Department of Justice
Washington, DC 20530

The Honorable Hillary Clinton
Secretary of State
U.S. Department of State
Washington, DC 20520

Dear Attorney General Holder and Secretary Clinton:

We respectfully request the administration's input on what steps may be taken, including by Congress, to respond to the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31) and *Medellin v. Texas*, 552 U.S. 491 (2008), and what additional measures may be taken to ensure that state and local officials are aware of the United States' obligations under the Vienna Convention on Consular Relations.

In 1969, the United States ratified the Vienna Convention on Consular Relations (VCCR). Article 36 of the VCCR grants individual foreign nationals a right of access to his or her consulate, and ensures that consular officials can visit their nationals and arrange for their legal representation. The receiving state bears the burden of facilitating such access by informing "the person concerned without delay of his rights [under Article 36]." United States citizens rely on the protections of the VCCR every day, and the U.S. Government frequently demands that other countries comply with the VCCR to ensure our citizens receive fair treatment when detained abroad.

In 2004, the International Court of Justice (ICJ) determined that the United States had violated Article 36(1)(b) of the VCCR by failing to inform 51 foreign nationals of their VCCR rights, and by failing to notify consular authorities of the detention of 49 foreign nationals. The United States had voluntarily consented to the ICJ's jurisdiction to hear such complaints when it ratified in 1969 an Optional Protocol Concerning the Compulsory Settlement of Disputes, which accompanies the VCCR.

On February 28, 2005, President Bush, in recognition that the United States was required to comply with the ICJ's decision and that doing so would continue to preserve these rights for American citizens abroad, issued a determination that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ's] decision in accordance with general principles of comity." The Supreme Court, however, in *Medellin v. Texas* held that the Optional Protocol is not a self-executing treaty and that the president did not have the authority unilaterally to enforce the decision of the ICJ. Chief Justice Roberts, writing for the Court, noted that "[n]o one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States." Nevertheless, the Court held that the *Avena* judgment did not have automatic domestic legal effect and that, to give it effect, congressional action is required. We believe that the United States should

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fulfill its international treaty obligations. As former Bush Administration State Department Legal Adviser John Bellinger emphasized in a recent op-ed published in *The New York Times* (attached), it is critical to the rights of U.S. citizens abroad that all nations fully comply with the VCCR.

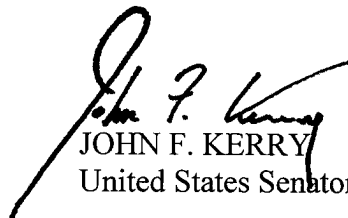
We would appreciate receiving your recommendations about what steps may be taken, including by Congress, to address the *Avena* judgment and the subsequent Supreme Court decision in *Medellin v. Texas*. We would also appreciate any recommendations you may propose for additional efforts to ensure that state and local officials are aware of our responsibilities under the VCCR.

Thank you for your attention to this important matter.

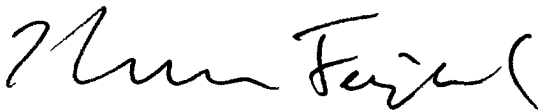
Sincerely,



PATRICK J. LEAHY
United States Senator



JOHN F. KERRY
United States Senator



RUSSELL D. FEINGOLD
United States Senator



BENJAMIN L. CARDIN
United States Senator



AL FRANKEN
United States Senator

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OP-ED CONTRIBUTOR
Lawlessness North of the Border

By JOHN B. BELLINGER III

PRESIDENT OBAMA has rightly emphasized America's commitment to complying with international law. It is surprising, then, that he has so far taken no steps to comply with decisions of the International Court of Justice requiring the United States to review the cases of 51 Mexicans convicted of murder in state courts who had been denied access to Mexican consular officials, in violation of American treaty obligations.

In contrast to its mishandling of detainees, the Bush administration worked conscientiously in its second term to comply with these rulings, even taking the step of ordering the states to revisit the Mexican cases, a move the Supreme Court invalidated last year. The Obama administration should support federal legislation that would enable the president to ensure that the United States lives up to its international obligations.

The international court's decisions arise from the arrest, conviction and death sentences of more than 50 Mexicans. As a party to the 1963 Vienna Convention on Consular Relations, the United States is required to inform foreigners arrested here of their right to have a consular official from their country notified of their arrest.

Unfortunately, it has proven all but impossible to guarantee that state law enforcement officials observe this obligation in all cases, and nearly all of the Mexicans at issue were never told of their Vienna Convention rights.

In 2003, Mexico filed suit against the United States in The Hague, demanding that the Mexicans' convictions be reviewed to determine whether the absence of consular notice had prejudiced the defendants' ability to hire qualified counsel. The international court sided with Mexico, ruling that the United States had violated the Vienna Convention, and ordered us to reconsider all of the convictions and death sentences.

This decision presented a serious legal and diplomatic challenge for President George W. Bush early in his second term. But Texas strongly opposed acquiescing to an international court, especially in the prominent case of José Medellín, who had been convicted of the rape and murder of two teenage girls.

Secretary of State Condoleezza Rice argued, however, that the United States was legally obligated by the United Nations Charter to follow the international court's decisions, and she emphasized the importance of complying to ensure reciprocal Vienna Convention protections for Americans arrested overseas. (The United States, for example, took Iran to the international court for violating the Vienna Convention by denying American hostages consular access during the 1979 embassy takeover.) President Bush ultimately issued an order in February 2005 directing state courts to follow the international court's decision.

But Texas challenged the president's order and, in March 2008, the Supreme Court sided with Texas. Chief Justice John Roberts acknowledged America's obligation to comply with the international court's decisions, but held that the president lacked inherent constitutional authority to supersede state criminal law rules limiting appeals and that Congress had never enacted legislation authorizing him to do so.

President Bush's advisers concluded that, in an election year, Congress could not be persuaded to pass legislation extending additional rights to convicted murderers. So instead Secretary Rice and Attorney General Michael Mukasey wrote to Gov. Rick Perry of Texas reminding him of the United States' treaty obligations. Although Governor Perry agreed to support limited review in certain cases, Texas nevertheless proceeded with the execution of José Medellín.

In the meantime, after the Medellín decision, Mexico sought a new ruling from the International Court of Justice that the United States had misinterpreted the court's earlier judgment. In January — in a case I argued — the international court concluded that although the United States clearly accepted its obligation to comply with the decision, our nation had violated international law by allowing Mr. Medellín to be executed. The court reaffirmed that the remaining cases must be reviewed.

President Obama now faces the same challenges as Mr. Bush in 2005: an international obligation to review the cases of those Mexicans remaining on death rows across the country; state governments that are politically unwilling or legally unable to provide this review; and a Congress that often fails to appreciate that compliance with treaty obligations is in our national interest, not an infringement of our sovereignty.

The Obama administration's best option would be to seek narrowly tailored legislation that would authorize the president to order review of these cases and override, if necessary, any state criminal laws limiting further appeals, in order to comply with the United Nations Charter.

From closing Guantánamo to engaging with the International Criminal Court to seeking Senate approval of the Law of the Sea Convention, President Obama is confronting the recurring tension between our international interests and domestic politics. But reviewing the Mexican cases as the international court demands is not insincere global theater. On the contrary, complying with the Vienna Convention is legally required and smart foreign policy. It protects Americans abroad and confirms this country's commitment to international law.

John B. Bellinger III, a lawyer, was the legal adviser to the State Department from April 2005 to January 2009.